IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT MULGREW	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	NO. 03-CV-5039
	:	
VINCENT J. FUMO, individually as a Pennsylvania State Senator	:	
	:	
Defendant	:	

MEMORANDUM AND ORDER

JOYNER, J. **July 26, 2005**

Defendant Vincent J. Fumo has filed a Motion for Reconsideration of this Court's June 30, 2005 Order denying his Motion for Summary Judgment. Specifically, Defendant's Motion for Reconsideration presents arguments identical to those raised in two previous motions, namely that Defendant believes he is entitled to Summary Judgment on qualified immunity grounds and because he finds no genuine issue of material fact. For the reasons which follow, Defendant's Motion shall be denied.

Factual Background

The facts of this case have been articulated clearly in two previous Orders issued by this Court.[1] However, the facts will be reiterated in this memorandum, so as to clarify any ambiguity regarding the genuineness and materiality of the factual issues.

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[1] Mulgrew v. Fumo, No. 03-5039, 2005 WL 1563345 (E.D. Pa. 2005)(denying Defendant's Motion for Summary Judgment); Mulgrew v. Fumo, No. 03-5039, 2005 WL 1463246 (E.D. Pa. 2005)(denying Defendant's Motion to Dismiss).

Plaintiff was hired to work in Defendant's constituent services office in December 1992. (Complaint, ¶ 5). Plaintiff's job responsibilities involved "taking telephone calls and meeting with Defendant's constituents who had questions about state government issues, such as driver licensing." (Id. at ¶ 8). Plaintiff contends that his responsibilities did not include work relating to Defendant's "legislative agenda," such as advocating for or against pending legislation or assisting Defendant in such activities. (Id. at ¶ 9). Plaintiff further asserts that he never made "public appearances where he held himself out to be a representative of Defendant." (Id. at ¶ 10). Moreover, Plaintiff argues that during the course of his employment, he infrequently interacted with Defendant, and neither spoke nor met with Defendant on a regular basis. (Id. at ¶ 11). Finally, Plaintiff contends that Defendant did not exercise day-to-day supervision over his work. (Id. at ¶ 12).

Conversely, Defendant in this action argues that Plaintiff's job responsibilities required him to "[r]epresent the Senator at various community meetings." (Exhibits A and C to Defendant's Summary Judgment Motion). Defendant further contends that Plaintiff "had access to confidential information regarding [Defendant's] legislative initiatives, stances and strategies, as well as access to [his] political initiatives, stances and strategies." (Exhibit A to Defendant's Summary Judgment Motion).

On May 13, 2002, in anticipation of the upcoming

Pennsylvania gubernatorial primary, Plaintiff and Defendant attended a cocktail party organized by the Philadelphia Democratic Committee. (Complaint, ¶¶ 15, 17). When Plaintiff entered the cocktail party, then-gubernatorial candidate Edward Rendell handed Plaintiff a campaign sticker reading "RENDELL GOVERNOR." (Id. at ¶ 18). Subsequent to Plaintiff placing the sticker on his jacket lapel, Defendant approached Plaintiff and told him to remove the sticker. (Id. at ¶¶ 19, 20). When Plaintiff did not comply, Defendant told Plaintiff that his employment was terminated. (Id. at ¶¶ 21, 22).

Plaintiff alleges that his employment was terminated solely because he did not remove the campaign sticker. (Id. at ¶ 23). Plaintiff further alleges that Defendant told several party attendees that Plaintiff was terminated because he would not remove the sticker. (Id. at ¶ 25). Defendant, however, contends that Plaintiff was not only wearing a Rendell for Governor button at the party, but also was standing with people "allied against [Defendant's] position with regard to the gubernatorial primary." (Exhibit A to Defendant's Summary Judgment Motion). Defendant further contends that Plaintiff was laughing at him, thereby causing Defendant embarrassment. (Id.). Accordingly, Defendant argues that he terminated Plaintiff because his conduct was "embarrassing and humiliating," "undermined [Defendant] in the eyes of [his] peers," and thus "impaired [Defendant's] ability to effectively carry out [his] official duties." (Id.).

Plaintiff instituted this lawsuit on September 8, 2003, alleging that Defendant's conduct violated both state and federal law. Defendant filed a Motion to Dismiss on November 7, 2003, challenging only Plaintiff's state law claims. On September 20, 2004, Defendant filed an Answer to Plaintiff's Complaint, specifically addressing the federal law claim. An Order dated October 27, 2004 subsequently delineated pre-trial practice, including discovery. Then on March 3, 2005, nearly a year and a half after filing his first Motion to Dismiss, Defendant filed a second Motion to Dismiss, now challenging Plaintiff's federal law claim. Specifically, Defendant argued that qualified immunity shielded him from Plaintiff's First Amendment claim. This Court, however, found Defendant's qualified immunity argument invalid as a matter of law, and entered an Order dated June 20, 2005 denying Defendant's Motion to Dismiss.

On June 22, 2005 Defendant filed a Motion for Summary Judgment, again based on qualified immunity. As Defendant's Motion essentially asked this Court to merely reconsider its prior ruling, we treated it as a motion for reconsideration and denied the Motion by Order dated June 30, 2005. Now before this Court is Defendant's third motion contending that judgment should be entered in his favor on qualified immunity grounds. The so-called "Motion for Reconsideration" also challenges this Court's previous determination that genuine issues of material fact exist, making summary judgment inappropriate.

Standards Governing A Motion for Reconsideration

The purpose of a motion for reconsideration is to correct manifest errors of law or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); Frederick v. S.E. Pa. Transp. Auth., 926 F. Supp. 63, 64 (E.D. Pa. 1996). A party filing a motion for reconsideration must rely on at least one of the following grounds: (1) the availability of new evidence that was not available when the court determined the initial motion; (2) an intervening change in the controlling law; or (3) the need to correct an error of law or to prevent manifest injustice. Hartford Fire Ins. Co. v. Huls Am., Inc., 921 F. Supp. 278, 279 (E.D. Pa. 1995); Prousi v. Cruisers Div. of KCS Intl., Inc., 1997 WL 793000 at *3 (E.D. Pa. 1991). Absent one of these three grounds, it is improper for a party moving for reconsideration to "ask the Court to rethink what [it] had already thought through - rightly or wrongly." Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993). Moreover, where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration. Harso, 779 F.2d at 909 (citing DeLong Corp. v. Raymond Intl., Inc., 622 F.2d 1135, 1139-40 (3d Cir. 1980)).

Discussion

In applying the law governing motions for reconsideration to the case now before us, we find that Defendant has failed to

present new or newly discovered evidence to this Court. Likewise, Defendant has not shown an intervening change in the controlling law nor persuaded this Court that it committed an error of law in issuing our June 30, 2005 Order. Rather, in moving for reconsideration, Defendant merely reargues the same points that he argued in both his Motion to Dismiss and Motion for Summary Judgment. Thus, Defendant fails to satisfy the stringent requirements for bringing a valid motion for reconsideration. Furthermore, Defendant's filing of three consecutive motions raising the same qualified immunity argument demonstrates a brazen refusal to accept this Court's ruling on the qualified immunity issue.

A. Qualified Immunity

Although this Court previously articulated the qualified immunity standard and applied the relevant law to the facts of this case, we will reiterate and elaborate upon our analysis in order to dispel Defendant's doubts concerning the finality of our ruling on the qualified immunity issue. The United States Supreme Court has held that an official does not enjoy qualified immunity if his conduct violated "clearly established" rights of which a "reasonable person" would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, "the immunity defense ordinarily should fail [when the law is clear], since a reasonably competent official should know the law governing his conduct." Id. at 818-19. Importantly, qualified immunity is not

meant to provide a "license to lawless conduct." Id. at 819.

The Supreme Court has found that political belief and association are clearly established, fundamental rights protected by the First Amendment. Elrod v. Burns, 427 U.S. 347, 356 (1976). Thus, a public employee may "act according to his beliefs" and "associate with others of his political persuasion." Id. Therefore, discharging a public employee solely on the basis of political patronage violates First Amendment rights to freely associate with the political party and/or candidate of that employee's choice. Id. at 360. In Elrod, the Supreme Court held that a patronage dismissal violates the First Amendment unless the terminated employee occupied a "policymaking position." Id. at 367. In identifying policymaking versus non-policymaking positions, "the nature of the responsibilities is critical." Id. Even a supervisor is not a policymaker if his responsibilities have "limited and well-defined objectives" that do not involve legislative duties. Id. at 368. Moreover, an at-will employee without "legal entitlement to continued employment" may not be terminated for political patronage if he does not engage in policymaking, represent the public official, or regularly interact with the public official. Id. at 359-60.

In Branti v. Finkel, 445 U.S. 507 (1980), the Supreme Court clarified the standards set forth in Elrod. The Court held that a Democratic public defender violated the First and Fourteenth Amendment rights of two assistant public defenders by firing them

solely because they were Republicans. Id. at 520. In his Motion for Reconsideration, Defendant Fumo argues that two hand-written lines on an Employee Reclassification Request form regarding Plaintiff's promotion from Clerk I to Clerk III conclusively prove, as a matter of law, that Defendant is entitled to qualified immunity. Specifically, the form briefly notes, without explanation, that Plaintiff may "[r]epresent the Senator at various community meetings" and "[r]esearch possible new legislation." (Exhibit C to Defendant's Motion for Summary Judgment). Defendant claims that under the legal standards set forth in Branti, it is "undisputable" that Plaintiff's job was one which entitles Defendant to qualified immunity.

The Branti analysis actually hinders, rather than helps, Defendant's position. The Defendant in Branti argued that "even if party sponsorship is an unconstitutional condition of continued public employment for clerks, deputies, and janitors, it is an acceptable requirement for an assistant public defender." 445 U.S. at 512. Thus, the Defendant in Branti conceded that dismissing a clerk solely on the basis of political patronage likely would be unconstitutional. In deciding the case, the Supreme Court moreover found patronage dismissals of two assistant public defenders unconstitutional. Id. at 520.

Although Defendant Fumo contends that two brief, handwritten statements guarantee him qualified immunity, the Supreme Court found in Branti that "the ultimate inquiry is not whether the

label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” Id. at 518. Under this standard, Defendant’s qualified immunity defense fails absent proof that not only Plaintiff’s uncontested Democratic party loyalty, but also his support of a particular Democratic candidate in the gubernatorial primary, was needed for effective job performance. Indeed, “the First Amendment protects a public employee from discharge based on what he has said [and] what he believes . . . unless the government can demonstrate an overriding interest of vital importance.” Id. at 515-516.

Despite Defendant Fumo’s assertion that the Employee Reclassification Request form proves Plaintiff’s work-related responsibilities and thereby conclusively entitles him to qualified immunity, the Supreme Court explained in Branti that “it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered.” Id. at 518. The Court further found it “equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position.” Id. Finally, the Supreme Court strongly considered the Plaintiffs’ “primary” responsibilities, rather than relying on snippets of evidence which might imply further policy-related duties. Id. at 519.

Defendant Fumo believes that two hand-written sentence

fragments on the Employee Reclassification Request constitute an "official job description" and are therefore "controlling with respect to this Court's consideration of Plaintiff's job duties," while "Plaintiff's own description of his understanding of his job duties . . . is of no moment." (Motion for Reconsideration, p.4). Although Defendant purports to support his argument by citing Brown v. Trench, 787 F.2d 167 (3d Cir. 1986), in that case the Third Circuit Court of Appeals found that "the Supreme Court has not specified the particular factors which indicate that a position falls within the Branti test." Brown, 787 F.2d at 169. Rather, courts consider multiple factors, such as (1) whether the employee primarily exercised clerical or discretionary duties, (2) whether the employee had authority to hire or fire employees, (3) the employee's salary, (4) the employee's power to speak in the name of policymakers, and (5) the employee's power to control others. Id. However, such duties are only "relevant to the question of whether political affiliation is a necessary job requirement," not independently determinative. Id. at 169-169. Overall, courts engage in a "functional analysis" of a terminated employee's former position, focusing their inquiry on "whether it is likely that party affiliation could cause plaintiff . . . to be ineffective in carrying out his duties and responsibilities." Mummau v. Ranck, 531 F. Supp. 402, 404 (E.D. Pa. 1982), aff'd 687 F.2d 9 (3d Cir. 1982); Ness v. Marshall, 660 F.2d 517, 521 (3d Cir. 1981).

As a matter of law, courts must "decide in any particular case whether party affiliation is an appropriate requirement for the effective performance of the public office involved." Ness, 660 F.2d at 520. After engaging in a multi-faceted "functional analysis," courts only may deem political patronage dismissals constitutional where "a difference in party affiliation [is] highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office." Id. at 521. The parties in this action do not dispute Plaintiff's loyalty to the Democratic party. Rather, Defendant Fumo merely asserts that Plaintiff personally favored a different Democratic candidate in the gubernatorial primary. Therefore, unlike past cases in which the defendant alleged that a common political party was necessary to ensure the plaintiff's adequate job performance, Defendant Fumo further argues that Plaintiff could not effectively carry out work-related duties without sharing specific political viewpoints. Thus, Defendant contends that Plaintiff's preference of a particular Democratic candidate in a primary election was vital to his effective job performance.

After considering all evidence submitted by Defendant Fumo, this court does not find Plaintiff's work-related duties as requiring him to personally favor all of Defendant Fumo's specific political viewpoints. Indeed, it is nearly impossible even for two individuals within the same political party to share exactly the same beliefs on all issues. To provide qualified

immunity here would enable political officials to fire a broad range of employees for possessing political beliefs which vary even slightly from the official's stance.

The parties in this action do not dispute that Plaintiff's responsibilities involved clerical tasks such as answering the telephone and correspondence filing. Such low-level tasks obviously do not constitute policymaking or confidential duties. Moreover, Plaintiff's personal preference for a certain candidate in the Democratic gubernatorial primary would not hinder effective completion of such clerical tasks. The parties disagree, however, as to whether Plaintiff represented Defendant at community meetings and researched possible new legislation. Regardless, Defendant has failed to present any evidence indicating that Plaintiff's preference among candidates in the Democratic gubernatorial primary would prevent him from conveying the Senator's views at a meeting or researching legislation.

Defendant likewise fails to meet several criteria articulated by the Third Circuit in Brown which indicate that a position requires political patronage. Specifically, Defendant provides no evidence suggesting that Plaintiff was authorized to supervise others. Moreover, Plaintiff did not contribute to hiring or firing decisions. Finally, Plaintiff's modest $26,500 salary in the Clerk III position fails to support the argument that Plaintiff occupied a high-ranking position where patronage dismissal was constitutional.

In sum, a public official will not receive qualified immunity where he "reasonably should have known that the action he took . . . would violate the constitutional rights of the [plaintiff]." Harlow, 457 U.S. 800 at 815 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)). As precedents from both the Supreme Court and Third Circuit have clearly established that a political patronage dismissal violates First Amendment rights where such patronage was not vital to the employee's duties at work, Defendant Fumo should have known that firing Plaintiff solely for political reasons was unconstitutional.

B. Genuine Issue of Material Fact Regarding the Reasons for Plaintiff's Termination

In his Motion for Reconsideration, Defendant Fumo argues that this Court further erred in concluding that a genuine issue of material fact exists concerning the reasons for Plaintiff's termination. This Court's decision remains unchanged, yet we will elaborate on our analysis in order to remove any ambiguity. For a plaintiff to prove that he was fired in violation of his First Amendment rights, he must show that the termination was solely due to his political beliefs. Branti, 445 U.S. at 516-517. Plaintiff in this action contends that he was discharged solely because he did not comply with Defendant's demand to remove a campaign sticker reading "RENDELL GOVERNOR." Plaintiff further alleges that Defendant told several party attendees that Plaintiff was terminated for failing to remove the sticker.

Thus, Plaintiff asserts that his political beliefs directly led to his termination. Conversely, Defendant Fumo argues that Plaintiff not only wore the sticker but also openly laughed at him. Defendant contends that he could not trust an employee who would publicly mock him. Accordingly, Defendant argues that the totality of Plaintiff's conduct caused his termination. As the parties disagree as to whether Plaintiff's political beliefs were the sole basis of his termination and the record is devoid of any evidence on this point, this contention creates a genuine issue of material fact. See, Branti, 445 U.S. at 510; Ness, 660 F.2d at 520. Thus, summary judgment is inappropriate.

C. Defendant's Improper Submission of Multiple Motions Concerning Qualified Immunity

The Federal Rules of Civil Procedure are intended to "secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. Rule 11(b)(1) explicitly provides the following restrictions regarding representations to the court:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances - it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 11(c) further empowers a court to impose sanctions upon "the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."

It appears to this Court that Defendant Fumo and his counsel have come close to violating Rule 11. Defendant's filing of three motions raising the same qualified immunity argument shows an insolent refusal to accept this Court's ruling on the issue. This Court analyzed Defendant's qualified immunity argument while considering his Motion to Dismiss Plaintiff's First Amendment Claim. We acted graciously in considering Defendant's Motion, as he brought it nearly a year and a half after filing a prior motion to dismiss Plaintiff's state law claims. Defendant's extreme delay in filing the second Motion to Dismiss alerted this Court that strategies intended to harass, delay, or increase costs were possibly being utilized. However, this Court gave Defendant the benefit of the doubt and refrained from admonition.

On June 22, 2005 Defendant again filed a motion requesting that this Court rule in his favor regarding qualified immunity. Although Defendant labeled the filing as a "Motion for Summary Judgment," it merely reasserted prior arguments and asked this Court to reconsider its prior ruling. Defendant's Motion for Reconsideration now asks this Court, for the third time, to grant him qualified immunity. Defendant simply refuses to submit to this Court's resolution of the qualified immunity issue.

Partisan advocacy ceases to constitute public service "when it misleads, distorts, and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult." Lon Fuller & John Randall, Professional Responsibility: Report of

the Joint Conference, 1958, 44 A.B.A.J. 1159, 1162. Defendant's repeated filings regarding qualified immunity likewise appear to have been intended to delay the just adjudication of this suit. As Rule 11 asks whether conduct was "reasonable under the circumstances," a court should test the signer's action by asking what was reasonable to believe at the time the motion was submitted. Teamsters Loc. Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 66 (3d Cir. 1988). Defense counsel brought the instant motion knowing both this Court's decision regarding the qualified immunity issue and the limited circumstances under which a motion for reconsideration may rightfully be brought. Although counsel attempted to frame the motion as one validly seeking reconsideration, it merely asks this court to change its mind, without a substantial basis in fact or law.

Several other factors lead this Court to believe that Defendant's repetitive filings were intended for the improper purpose of delay. First, courts have found conduct inappropriate where the offending action was "part of a pattern of activity," rather than an isolated event. Lal v. Borough of Kennett Square, 935 F. Supp. 570, 577 (E.D. Pa. 1996). Not only has Defendant Fumo attempted to delay proceedings by filing three motions regarding qualified immunity, even the Motion to Dismiss initially heard by this Court was brought nearly a year and a half after the reasonable time period for filing. Second, courts consider whether the person demonstrating improper conduct is

"trained in the law." Id. In this case, both Defendant's counsel and the Defendant himself have legal training. Finally, courts consider "what effect [the improper conduct] had on the litigation process in time or expense." Id. Importantly, Defendant's repeated filings have wasted the time and money of both Plaintiff and this Court.

Although this Court currently does not find it appropriate to initiate a process possibly leading to Rule 11 sanctions, we strongly caution Defendant and his counsel against the submission of any future motions by which he tries to delay proceedings or resurrect legal matters already decided by this Court.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT MULGREW	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	NO. 03-CV-5039
	:	
VINCENT J. FUMO, individually as a Pennsylvania State Senator	:	
	:	
Defendant	:	

ORDER

AND NOW, this 26th day of July, 2005, upon consideration of Defendant Vincent J. Fumo's Motion for Reconsideration (Doc. No. 28), and Plaintiff's response thereto (Doc. No. 29), it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.